

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: } Chapter 11
Fleming Companies, Inc., } Case No. 03-10945 (MFW)
Debtors,¹ } Jointly Administered
Fleming Companies, Inc., Plaintiff, } Adversary Proceeding
v. } Case No. 04-52747
Target Corporation, Defendant. }

PCT'S MOTION FOR LEAVE TO AMEND PLEADINGS

The Post-Confirmation Trust of Fleming Companies, Inc. ("Fleming") hereby moves for leave to file its First Amended Complaint pursuant to Rule 7015 of the Federal Rules of Bankruptcy Procedure and Rule 15 of the Federal Rules of Civil Procedure and respectfully states as follows:

¹ The former Debtors whose cases are still open are: Core-Mark International, Inc.; Fleming Companies, Inc.; ASI Office Automation, Inc.; C/M Products, Inc.; Core-Mark Interrelated Companies, Inc.; Core-Mark Mid-Continent, Inc.; General Acceptance Corporation; Head Distributing Company; Marquise Ventures Company, Inc.; and Minter-Weisman Co.

1. Fleming's proposed First Amended Complaint clarifies an ambiguity in Count III of its original complaint and adds a Fourth Count for breach of contract in violation of the automatic stay under 11 U.S.C. § 362.

2. Count III of Fleming's original Complaint referenced certain "pre-petition invoices" illegally held by Target. This language simply reiterated Target's position on these invoices; it was in no way intended to adopt that incorrect position. To clarify any residual ambiguity, and to conform the Complaint to its recently filed Motion for Summary Judgment, Fleming seeks to amend its Complaint to reflect the true post-petition nature of these invoices.

3. Fleming also seeks to add to its Complaint a Fourth Count for breach of the January 23, 2002 contract in violation of the automatic stay under 11 U.S.C. § 362. Target never terminated or attempted to terminate the contract prior to Fleming's bankruptcy. Target knew of Fleming's bankruptcy immediately after it happened. Yet on May 29, 2003 Target intentionally terminated the contract and the rest of its relationship with Fleming, effective June 6, 2003.

4. As detailed at Exhibit F to Damian D. Capozzola's supporting affidavit, Fleming has made reasonable efforts to reach agreement with Target to stipulate to the filing of this First Amended Complaint in accordance with Local Rule 7.1.1. Target has rejected these efforts.

5. Fleming respectfully requests that this Court enter an order granting Fleming leave to amend its Complaint in the form of the First Amended Complaint, two copies of which are attached to this motion as Exhibit A. A form of the amended pleading indicating changes in accordance with Local Rule 15.1 is attached as Exhibit B.

This motion is based upon all of the files, records, and proceedings in this action, and upon the accompanying Brief in Support of PCT's Motion for Leave to File its First Amended Complaint, Affidavit of Damian D. Capozzola, and the supporting Appendix.

Notice

Notice of this Motion has been given to Target and all recipients under the New 2002 List authorized by Docket No. 9583.

No Prior Request

No previous request for this relief has been made to this Court or any other court.

Certification of Conference with Counsel

Fleming's counsel conferred with opposing counsel to seek a stipulation concerning this motion, but Target refused. Capozzola Aff. Ex. F.

Wherefore, the PCT requests that the Court enter an order substantially in the form of the Order attached hereto granting this Motion.

Executed on: January 20, 2005

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& WEINTRAUB P.C.


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